No. 82 - 1995

In The

Supreme Court of the United States

October Term, 1982

EDWARD NEMBHARD and JAMES WILSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DOMENICK J. PORCO
DILLER & SCHMUKLER
Attorneys for Petitioners
345 Park Avenue
New York, New York 10154
(212) 371-1400

9658
Fitz Appellate Printers, Inc. • NJ (201) 257-6850 • NY (212) 840-9494 • PA (215) 563-5587
MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 221-0008

QUESTIONS PRESENTED

1. Whether under the principles of *Florida v. Royer,* 103 S. Ct. 1319 (1983) petitioners were illegally detained and interrogated in a police interrogation room and thus their consent to a search of their belongings was tainted by the illegal detention.

2. Whether the denial of a trial severance deprived petitioner Edward Nembhard, who sought to call petitioner James Wilson as a witness, of his Sixth Amendment rights to compulsory process and to present a defense.

3. Whether the Fifth Amendment to the United States Constitution permits the Government to present hearsay evidence to a grand jury without informing that body of the hearsay nature of the evidence.

THE PARTIES

The parties in the court below were the United States of America, Appellee, and Edward Nembhard and James Wilson, Appellants.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Contents

Contents

Contents

No.

In The

Supreme Court of the United States

October Term, 1982

EDWARD NEMBHARD and JAMES WILSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice of the United States and Associate Justices of the United States Supreme Court:

Petitioners Edward Nembhard and James Wilson respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming a judgment of the United States District Court for the Eastern District of Michigan, convicting petitioners of possession with intent to distribute heroin, in violation of 21 U.S.C. §841(a)(1).

OPINIONS BELOW

The decision of the Court of Appeals affirming the judgments of conviction is unreported and is appended hereto as Appendix A. The decision of the Court of Appeals on an interlocutory appeal by the United States is at 676 F. 2d 193 (6th Cir. 1982) and appended hereto as Appendix B. The decisions of the District Court are reported at 512 F. Supp. 15 and 19 (E.D. Mich. 1980) and are appended hereto as Appendices C and D respectively.

JURISDICTION

The Court of Appeals' judgment was entered April 8, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution is as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment to the United States Constitution is as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein

> the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fifth Amendment to the United States Constitution is as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioners were indicted for possession with intent to distribute approximately 275 grams of heroin and for aiding and abetting each other in the possession thereof. Prior to trial both petitioners moved to suppress as evidence the subject contraband, which had been obtained from them by Drug Enforcement Administration (DEA) agents at Detroit Airport in April 1980. In July 1980, a hearing was held on petitioners' motion. The evidence at that hearing, as stated by the Court of Appeals (8a-10a) showed the following:

"On April 21, 1980, Detective Sergeant Paul Cleaves of the Michigan State Police and Special Agent William Modesitt of the Drug Enforcement Administration (DEA) were observing deplaning passengers at Detroit Metropolitan Airport from an American Airlines flight from New York City, a source city of white heroin. Edward Nembhard and James Wilson were the first two passengers to deplane, Nembhard carrying a tan vinyl suitcase and Wilson carrying a black briefcase. Nembhard, who was in the lead, appeared to be in a hurry, and nervously scanned the deplaning area as if he were looking for someone. The two men did not walk together or speak to each other, and appeared not to know each other.

Both men walked to a bank of telephones near the deplaning lounge, made telephone calls while looking back in the agents' direction, and hung up at about the same time. Agent Modesitt left the lounge area to follow another passenger, a young white woman, before the termination of the phone calls, and Cleaves was left to continue the surveillance. Wilson hung up the telephone and began walking slowly toward the concourse. Nembhard also hung up his telephone, breezed past Wilson, and began walking up the concourse, staying about ten to twenty feet ahead of Wilson, who quickened his pace when Nembhard passed him. Nembhard constantly looked back toward the trailing agent as he continued up the concourse and slowed down periodically, allowing Wilson to catch up. The lead changed at one point, with Wilson passing Nembhard, but Nembhard regained the lead and eventually a sizeable interval between

the two men emerged. Nembhard then stopped at a bank of telephones near the airport restaurant, and dialed a number without apparently depositing any money in the telephone. Nembhard hung up when Wilson caught up with him, and they began conversing as they entered the restaurant together. Wilson and Nembhard had not spoken to each other any time during their journey down the concourse nor acknowledged each other's presence until this point.

His suspicions fully aroused, Cleaves called for assistance and he was eventually joined by Agents Bruce Bryda, Robert Dunn and Richard McCoy. Agent Modesitt also rejoined the surveillance at the restaurant. Wilson and Nembhard spent about thirty-five minutes in the restaurant, sitting at the same table and conversing. Nembhard stared at Cleaves several times as Cleaves, seated at the bar, glanced in their direction. When the suspects exited the restaurant, the agents noticed that they had exchanged their luggage, Nembhard now carrying the tan vinyl luggage and Wilson the black briefcase. Nembhard paced up and down waiting for Wilson to finish a phone call he made upon leaving the restaurant. They then walked together at a normal pace through the north terminal.

When they reached the end of the concourse, Nembhard glanced back down the concourse, then both men scurried down an escalator, through the baggage claim area for United Airlines (although their flight had been on American Airlines), and left the terminal. As they headed for a taxicab,

three of the agents, who had used another exit, approached them. Agent Modesitt, addressing Wilson, identified himself as a police officer, showed Wilson his badge, and asked if Wilson would step aside out of the path of traffic from the terminal exit to answer some questions, which Wilson assented to do. Modesitt then asked if he could see Wilson's airline ticket and some identification. Wilson, his hands shaking, produced a New York driver's license with his proper identification, but claimed he had no airline ticket, contending that he had been in Detroit for two days visiting friends. He also denied knowing Nembhard, claiming they had never met.

Agents Bryda and McCoy simultaneously approached Nembhard, who also stepped off to the side of the terminal exit. In response to Agent Bryda's inquiries, Nembhard claimed he had neither identification nor an airline ticket but stated that his name was Edward Nembhard. He at first claimed that he did not know Wilson, but when challenged by the agents' recitation of his restaurant rendezvous with Wilson, Nembhard maintained that they had met on the airplane. When asked to accompany the agents to the first aid office inside the terminal for further questioning, both Wilson and Nembhard agreed to do so.

At the first aid room about thirty-five yards away, Modesitt and Wilson waited in the hall for several minutes while the other agents spoke to Nembhard. Nembhard's briefcase was searched with Nembhard's consent, but nothing illicit was

> discovered, although it contained papers belonging to Wilson. After Nembhard was thanked for his cooperation and left the room, Wilson and Modesitt entered the room. Agent Modesitt advised Wilson that he was a federal narcotics agent, said he was looking for narcotics coming into the airport, and told Wilson he believed Wilson could be carrying narcotics. Wilson did not respond. Modesitt asked for Wilson's consent to search his luggage and person; Wilson was advised of his right to refuse. Wilson told Modesitt he could search the suitcase but denied it was his luggage and claimed he was paid to carry it. Modesitt opened the suitcase, seized approximately ten ounces of 67% pure heroin, and placed defendants under arrest."

At the conclusion of the suppression hearing, the District Court denied the motion and the case proceeded to trial.

Prior to the commencement of trial, counsel for Nembhard moved for a severance on the ground that, since Wilson's suppression hearing testimony was exculpatory as to Nembhard, Wilson would be called as a witness,[1] but at a joint trial he could not be compelled to testify (T3-5).[2] The court denied that motion (T35-37).

---

1. At the suppression hearing, Wilson had testified that contrary to agents' assertion, he alone had possessed the bag containing the contraband through the entire period of surveillance (H5, 25-27).

2. Parenthetical references to "T" refer to pages of the trial transcript; "H" refers to the minutes of the suppression hearing.

At trial, during the cross-examination of Agent Modesitt, one of the arresting agents, it was revealed that Modesitt was the only one of the agents involved in the case to have testified in the grand jury. His testimony before the grand jury recited the events leading up to the seizure of the contraband, except that at no time did he inform the jury that he had not been present during most of the events he was testifying about. As a result, defense counsel made a motion for a mistrial and dismissal of the indictment, which the District Court held in abeyance pending the jury's verdict. Following the verdict, the motion was granted (33a). The court also granted petitioners' reviewed motion to suppress, which it had previously denied, stating that the credibility of the agents in light of Modesitt's misleading grand jury testimony and the agents' apparent reliance on the petitioners' race as a basis for their suspicions, had been destroyed (36a).

The Government thereafter appealed from both orders and on April 23, 1982, the Court of Appeals reversed and remanded the case back to the District Court for reinstatement of the jury verdicts and the entry of judgments thereon (25a).

Pursuant to the mandate of the Court of Appeals, on May 19, 1982, the District Court entered the jury verdict and on July 23, 1982 sentenced each petitioner to five (5) years of incarceration to be followed by a special parole term of four (4) years.

Petitioners thereupon appealed from their respective judgments of conviction and on April 8, 1983, the Court of Appeals affirmed (5a). This petition followed.

REASONS FOR GRANTING THE WRIT

The writ should issue from the following reasons:

A. The seizure of the contraband at Detroit Metropolitan Airport was conducted in violation of the petitioners' Fourth Amendment rights under the authority of *Florida v. Royer,* ____ U.S ____, 103 S. Ct. 1319 (March 23, 1983). Indeed petitioners submit that this case is indistinguishable from *Royer.* The Court of Appeals' conclusion here is contrary to the constitutional limitations imposed by *Royer* and *Dunaway v. New York,* 442 U.S. 200 (1979) on police-citizen encounters. It is petitioners' position, therefore, that even if this Court decides not to review the Fourth Amendment issues in this case on the merits, at the very least the case should be remanded to the Court of Appeals for reconsideration in light of *Royer.*

B. The deception of the grand jury by the testifying federal agent as to the hearsay nature of his testimony was a gross violation of petitioners' Fifth Amendment rights not to be tried for a "capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury." In *United States v. Estepa,* 471 F. 2d 1132 (2d Cir. 1972) the Second Circuit held that the failure to inform a grand jury that it is receiving hearsay evidence is improper and warrants dismissal of the indictment. In *United States v. Barone,* 584 F. 2d 118 (6th Cir. 1978) and in this case the Sixth Circuit has pointedly refused to accept the principles of *Estepa.* There is thus a conflict among the Circuits as to an important issue of constitutional law and it ought to be resolved by this Court.

C. The refusal to sever the trial of co-defendants where, as here, one defendant has previously given testimony exculpating the other, is a violation of the latter's Sixth

Amendment rights to compulsory process and to present a defense. Here, petitioner James Wilson testified at the suppression hearing that petitioner Edward Nembhard had not possessed the bag containing the contraband. It was thus a violation of petitioner Nembhard's aforementioned rights to have denied him a severance.

A.

In upholding the DEA agents' conduct at the airport, the Court of Appeals found that the agents' initial approach of the petitioners and their temporary detention for purposes of questioning was proper under the principles of *Terry v. Ohio,* 392 U.S. 1 (1968) and its progeny. *See* Appendix B at 21a-24a. While petitioners take respectful exception to that conclusion,[3] that is not the basis for seeking certiorari. Rather, it is the Court of Appeals' characterization of the events following the initial encounter, as stated in the following language, that we submit is entirely at odds with *Royer* and *Dunaway:*

> Furthermore, the additional information received by the agents during the minimally intrusive initial stage of questioning "provided a quantum leap to the 'articulable facts' known" by the agents. *United States v. Berd,* 634 F. 2d 979, 986 (5th Cir. 1981). When Wilson lied about having been in Detroit for two days, Nembhard denied having identification or a ticket, and both defendants denied knowing each other when

---

3. In petitioner's brief to the Court of Appeals on the Government's interlocutory appeal, we advanced much the same arguments against the propriety of the initial encounter as were put forth by Justice Brennan in his concurring opinion in *Royer.*

> surveillance had indicated an intimate association resulting in the exchange of carry-on luggage, a request to retire to the terminal for additional questioning, although involving a more significant intrusion, was entirely justified under the circumstances. Even if the questioning of the defendants is considered a custodial interrogation amounting to the essential equivalent of an arrest, *Dunaway v. New York*, 442 U.S. 200 (1979), *United States v. Blum*, 614 F. 2d 537 (6th Cir. 1980), we conclude that the circumstances gave rise to probable cause for continued detention for additional questioning; therefore, we need not determine whether defendants trip inside the terminal was voluntary or a result of coercion.

(24a-25a) footnote omitted.

Although it used the term "probable cause" the court pointedly did not say, nor could it reasonably have said, that the information obtained during the initial encounter provided a basis for petitioners' *arrest.*[4]

Rather, the court concluded that the false answers given by petitioners in response to the agents' inquiries provided a basis for "continued detention for additional questioning" and thus it was proper to remove petitioners to the interrogation room.

---

4. The sum total of the information possessed by the agents at the moment they decided to remove petitioners to the interrogation room was that petitioners loosely fit the "drug courier profile" (*see Florida v. Royer*, 103 S. Ct. at 1322, n.2) and that they gave apparently false answers to questions put to them by the agents. Those facts simply could not constitute probable cause for arrest (*Cf. Florida v. Royer*, 103 S. Ct. at 1329) and it is significant that the Court of Appeals stopped short of saying otherwise.

In so holding, the Court of Appeals sanctioned the very type of police activity proscribed in *Dunaway,* to wit, verification of suspicion "by means that approach the conditions of arrest." *Florida v. Royer,* 103 S. Ct. at 1319 (discussing *Dunaway v. New York*).

The Court of Appeals may have been correct in concluding that further questioning was warranted once the agents received false answers,[5] but for the reasons set forth in *Royer,* the removal and confinement of the petitioners in a small room in the presence of two federal agents who accused each of them of carrying narcotics, "went beyond the limited restraint of a *Terry* investigative stop, and [petitioners'] consent was thus tainted by the illegality." *Ibid.,* 103 S. Ct. at 1326.

If the agents' suspicions were heightened by petitioners' false answers they could very well have continued their interrogation where they were and have attempted to obtain consent to search there. *Royer,* 103 S. Ct. at 1328. No reason was advanced in the proceedings below for petitioners' removal to the interrogation room. And, indeed, the Court of Appeals' sole basis for upholding that action was its erroneous belief that the agents had a right to do so.

As in *Royer,* 103 S. Ct. at 1328, this record does not establish any basis for a "finding that the legitimate law enforcement purposes which justified the detention in the first instance were furthered by removing [petitioners] to the police room prior to a search of [their] luggage."

The foregoing discussion amply demonstrates that there is a nearly complete identity of issues between this case and *Royer.*

---

5. Just as the information received during Royer's detention was held by this court to have provided a basis for further questioning. *Ibid.* 103 S. Ct. at 1326.

Petitioners therefore request that the writ issue and that the judgment of the Court of Appeals be reversed. At the very least, the case should be remanded to the Court of Appeals for reconsideration in light of *Royer*.

B.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

> The right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967).

It is this most basic right of which petitioner Nembhard was deprived when the trial court denied his motion to sever. This demands a reversal. *Olmstead v. United States*, 19 F. 2d 842, 53 A.L.R. 1472 (9th Cir. 1927), *aff'd*, 277 U.S. 438, 48 S. Ct. 564 (1928).

Petitioner Nembhard moved that his trial be severed from that of his co-defendant on the ground that a joint trial would preclude a proffer of exculpatory evidence from the co-defendant. The decisions of various Circuit Courts point to certain allegations

which must be made by the movant and factors to be considered by the trial court in exercising its discretion when a motion to sever is grounded on a claim such as the petitioner now asserts.

Initially the movant must make a clear showing that the testimony in question would be exculpatory in nature. *United States v. Starr,* 584 F. 2d 235 (8th Cir. 1978); *United States v. Boscia,* 573 F. 2d 827 (3d Cir. 1978); *United States v. Morrow,* 537 F. 2d 120 (5th Cir. 1976); *United States v. Vaughn,* 422 F. 2d 812 (6th Cir. 1970); *United States v. Echeles,* 352 F. 2d 892 (7th Cir. 1965); *United States v. Grindstaff,* 479 F. Supp. 599 (E.D. Tennessee 1978). Details of the nature, extent or materiality of the exonerating evidence must be placed before the trial court. *United States v. Jackson,* 549 F. 2d 517, 524 (8th Cir. 1977).

Undoubtedly, such a showing was made in this case. The exculpatory testimony of the co-defendant was initially given at the suppression hearing (H4, 5, 23, 26). It was brought before the court by defendant's counsel in oral argument on the motion to sever (T7-10). The specific evidence was before the court and discussed.

The District Court found that the co-defendant's testimony was not exculpatory. However, the record appears to reflect that in arriving at this conclusion the court erroneously considered testimony which was never alleged by petitioner Nembhard to be exculpatory, and failed to consider the pertinent testimony (T36).[6] In determining that Wilson's testimony was not exculpatory as to Nembhard, the court focused only on Wilson's disclaimer of ownership of the tan bag and of knowledge of its source, and

---

6. The exculpatory testimony to which petitioner referred the court were certain statements made by co-defendant Wilson at the suppression hearing, where he had testified that he (Wilson) had been in possession of the tan vinyl bag containing the heroin and that Nembhard never possessed it (H4, 5, 23, 26).

concluded that Wilson had not been a "forthcoming" witness at the hearing and therefore highly subject to impeachment.

Petitioner Nembhard submits that there can be no doubt as to the exculpatory nature of Wilson's hearing testimony, and that the court's conclusion to the contrary was erroneous.

Nembhard was charged with possession with intent to distribute heroin on two separate theories: actual physical possession and aiding and abetting. The former was based on the testimony of the surveilling agents to the effect that Nembhard was originally in possession of the bag ultimately found to contain the heroin. Clearly, Wilson's assertion to the contrary, that he alone carried the vinyl bag, was exculpatory at least as to the counts charging Nembhard with actual possession since it tended to disprove the central element of those charges. Given the fact that Wilson's testimony was an admission against penal interest, it could very well have carried great weight with the jury.

Since the jury obviously believed Nembhard did carry the tan vinyl bag, the verdict on the aiding and abetting counts was a foregoing conclusion. If, however, the jury had heard Wilson's testimony and, for the reasons already stated, had accepted it, it would have been much more difficult for them to find Nembhard guilty of aiding and abetting. Thus, Wilson's testimony was exculpatory as to *all* the charges against Nembhard.

It is true, of course, that the jury may have rejected Wilson's testimony, but this possibility should not come to bear upon the court's inquiry as credibility is solely within the province of the jury. *Byrd v. Wainwright,* 428 F. 2d 1017, 1021 (5th Cir. 1970). A fair trial for Nembhard required that he be given the opportunity to present his co-defendant's testimony to the jury, regardless

of how the court might view the credibility of the co-defendant or his testimony. *Echles, supra,* 352 F. 2d at 898.[7]

In *Byrd* the court suggested that the inquiry as to the propriety of denying a severance under circumstances similar to those in this case should be "restated in terms of the extent of potential prejudice to the defendant if the defendant is tried without the opportunity to elicit the co-defendant's testimony." *Ibid.* at 1020. So stated, it is clear that petitioner Nembhard was severely prejudiced by the unavailability of Wilson's testimony. Since the only evidence before the jury was the testimony of the Government agents, who placed the tan bag in Nembhard's possession, the lack of direct contradiction of that evidence had to have had an effect on the jury. Wilson's testimony would have created a significant counterpoint to the Government's evidence against Nembhard.

A similar situation was presented in *Echles,* 352 F. 2d 892 (7th Cir. 1965). There, the only effective witness available to Echles was his co-defendant. Moreover, as in this case, the co-defendant had already made similar exculpatory statements at a previous judicial proceeding while under oath. The court held that under those circumstances it was an abuse of discretion to deny Echles' motion for a severance:

> [H]aving knowledge of Arrington's [co-defendant] record testimony protesting Echles' innocence, and considering the obvious importance of such

---

7. Petitioner is aware that the court may inquire as to the credibility of testimony where there is concern that it may be a patent fabrication. *Byrd,* 428 F. 2d at 1026. In this case, however, there was nothing to indicate that Wilson's testimony could be characterized as obviously false. To the contrary, the fact that it was manifestly against Wilson's penal interest added to its trustworthiness.

> testimony to Echles, it was error to deny the motion for a separate trial.

352 F. 2d at 898. The fact that in this case Wilson did not specifically state "Mr. Nembhard is innocent", as was the situation in *Echles,* does not change the result because having admitted that Nembhard did not possess the tan vinyl bag was tantamount to such a protestation by Wilson.

After establishing the nature of a co-defendant's testimony as exculpatory and significantly relevant, the movant must next establish that the co-defendant is likely to testify at a separate trial. *United States v. Starr,* 584 F. 2d 225 (8th Cir. 1978); *United States v. Boscia, supra; United States v. Morrow,* 537 F. 2d 120 (5th Cir. 1971); *United States v. Echles, supra.*

This does not require that movant present an affidavit under oath from the co-defendant, and movant's attorney need not testify under oath or by affidavit that he will call the co-defendant as a witness in a separate trial. *Morrow,* 537 F. 2d at 135, n.9; *Byrd v. Wainwright,* 428 F. 2d at 1020.

However, the court is not required to sever when "the possibility of the co-defendant's testifying is merely colorable." *Byrd v. Wainwright,* 428 F. 2d at 1022.

Petitioner Nembhard contends that the possibility of his co-defendant's testifying was far more than colorable; it was a virtual certainty. Counsel for petitioner Nembhard made very clear, with full discussion, that Nembhard intended to exercise his right to compulsory process by calling Wilson as a witness (T30). Wilson's counsel made very clear that Wilson would take the stand and testify in a manner consistent with his suppression hearing testimony, provided that he be tried first so as not to be compelled to plead the Fifth Amendment (T33-34). The certainty of Wilson's

testifying was supported by the fact that he was subpoenaed by Nembhard (T7).

In the cases cited in this petition it was held that where the co-defendant has previously given exculpatory testimony under oath, this indicates very strongly the likelihood that he will testify again. Here, the District Court chose to ignore this significant indicator. It implied that defense counsel had merely asserted that Wilson would testify and, citing *United States v. Boscia,* 573 F. 2d at 832, declared that "bare assertion that a co-defendant will testify is not enough." (T35).

We suggest there was significant other indicia to the likelihood of Wilson's testifying. Since there was such a strong likelihood that Wilson would have testified at a separate trial, petitioner Nembhard "should not be foreclosed of the possibility . . . merely because that eventuality was not a certainty." *Echles,* 532 F. 2d at 898.

With respect to counsel's request that Mr. Nembhard's trial follow Mr. Wilson's, we recognize that courts are hesitant to permit defendants to "play games". *United States v. Gay,* 567 F. 2d 916 (9th Cir. 1978). But that does not suggest that trial courts, in all cases, should reject an offer of a co-defendant witness to provide exculpatory testimony conditional on a separate trial to be held prior to that of the movant. *Gay,* 567 F. 2d at 921.

In the circumstances of this case, where petitioner would be severely prejudiced by the trial court refusing to grant a severance, it would be erroneous for the court to grant a severance while still requiring the co-defendant witness to be tried after the movant. "Granting the severance in this form would be tantamount to denying the motion to sever." *Gay,* 567 F. 2d at 921.

The sequence of trials is in the discretion of the court. *Byrd v. Wainwright, supra. See also, United States v. Sanders,* 266

F. Supp. 615 (W.D. La. 1967) in which the court granted severance to two defendants and established an order of trials. And the Seventh Circuit has specifically held that it is not improper for the trial court to direct the Government to proceed first with the case against the co-defendant witness. *Echles,* 352 F. 2d at 898.

Clearly, the request that Wilson be tried first was reasonable, for to have granted the severance and have tried Nembhard first would have subjected Wilson to the same danger of self-incrimination as existed in the joint trial: Wilson could not give his exculpatory testimony without fear that it would be used subsequently at his trial. If, as we argue, severance was proper, so was the order of trial suggested.

The third factor to be considered on a motion to sever is the degree of impeachability of the proffered testimony. *United States v. Boscia, supra.* We submit that Wilson's testimony was not so incredible as to overcome the other considerations compelling severance. It was a clear abuse of discretion for the trial court to have seized upon this factor alone and have based its decision not to sever solely on its opinion that Wilson was subject to impeachment. Considering the importance of the testimony to petitioner Nembhard, the mere possibility that Wilson could be impeached generally was not a proper basis to deny the severance.

> The truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court.

Washington v. Texas, supra, 388 U.S. at 22, 87 S. Ct. at 1924.

> If the Supreme Court cases of *Washington v. Texas, supra,* and *Chambers v. Mississippi, supra,* mean anything, it is that a judge cannot keep important yet possibly unreliable evidence from the jury.

Pettijohn v. Hall, 599 F. 2d 476, 481 (1st Cir. 1979).

Moreover, Wilson's exculpatory testimony — that Nembhard never had possession of the bag with the heroin — was not subject to impeachment except by the contrary testimony of the agents. Thus, at most it would have been subject to rejection by the jury strictly on the basis of its assessment of credibility. But it is equally likely that the jury would have accepted it. At the very least, the testimony may have created a reasonable doubt of Nembhard's guilt.

The final consideration by the court is the matter of judicial economy. It is well established that "a single, joint trial, however desirable from the point of view of efficient and expeditious criminal adjudication, may not be had at the expense of a defendant's right to a fundamentally fair trial." *Echles,* 352 F. 2d at 896. *See also, Boscia,* 573 F. 2d at 833; *United States v. Abraham,* 541 F. 2d 1234, 1240 (7th Cir. 1976).

This Court, on a number of occasions, has spoken on the supremacy of the Sixth Amendment right to compulsory process and to present a defense. For example, in *Washington v. Texas, supra,* it was held that the State's interest in avoiding perjured testimony did not justify its rule barring co-conspirators from testifying. Similarly, in *Chambers v. Mississippi, supra,* the defendant's right to present evidence favorable to his cause was held to be paramount to the State's interest in excluding third party hearsay confessions. In *Davis v. Alaska,* 415 U.S. 308 (1974) even the compelling interest of the State in maintaining the

confidentiality of juvenile criminal records was held subordinate to the right of a criminal defendant to present those records as part of his defense. Finally, in *Nixon v. United States,* 418 U.S. 683 (1974) the executive privilege of the President of the United States was held subordinate to the defendant's right to present evidence.

Clearly, the need for judicial economy, which is the only consideration that warrants joint trials, is not of such magnitude as to defeat the Sixth Amendment.

Petitioner Nembhard respectfully submits that the facts of this case present a most fitting occasion for this Court to express its views on such a fundamental constitutional question.

In *United States v. Estepa,* 471 F. 2d 1132 (2d Cir. 1972) the Second Circuit held that even though there is no affirmative duty to inform a grand jury that it is listening to hearsay, if the grand jury is misled into believing it is getting a first-hand account when in fact it is listening to hearsay, dismissal of the indictment is not only appropriate, but required. In that case the sole witness before the grand jury was a surveilling agent who was able to testify to certain events only through information supplied to him by other agents. However, the grand jury was never informed of the hearsay nature of his testimony.[8]

That is precisely what happened here. Not withstanding the attempt in this case to minimize the degree of deception, the fact is that Modesitt testified in the grand jury as though he was an eyewitness to the events he was relating, even though he was present only at the very beginning and at the end of the scenario. His testimony as to petitioners' conduct during their walk from the

---

8. The Court of Appeals found that the failure to apprise the grand jury of the "shoddy merchandise it was getting" was "unwitting" (471 F. 2d at 1137).

telephone bank to the restaurant — Nembhard's "nervousness", his attempt to keep a steady distance from Wilson, his scanning of the area as he walked — was based entirely on what Cleaves told him, yet, nowhere is that fact brought out. There was simply no basis for the jury to have believed anything other than that Modesitt was reciting his observations.

The question, then, is not whether the misconduct found by the District Court actually occurred, but, rather, whether dismissal of the indictment was the appropriate sanction for that misconduct. Petitioners submit that it was.

Although *Estepa* was the culmination of a long history of similar abuses unique to the Second Circuit, the principle upon which that case rests is sound and undisputed, to wit: the manner of presenting the evidence before a grand jury may not impair the independence and integrity of that body. *See United States v. Wander,* 601 F. 2d 1251 (3rd Cir. 1979); *United States v. Cruz,* 478 F. 2d 408 (5th Cir. 1973); *United States v. Harris,* 521 F. 2d 1089 (7th Cir. 1975); *United States v. Smith,* 552 F. 2d 257 (8th Cir. 1977).

Thus, in *Estepa,* the indictment was dismissed not because hearsay evidence was used, but because the grand jury was denied the privilege of requesting better evidence if it so desired.

Petitioners argued below that even though this Court has ruled that hearsay evidence is permissible in a grand jury [*Costello v. United States,* 350 U.S. 359 (1956)] it is nevertheless required that the grand jury be advised of that fact. *United States v. Estepa, supra.* The Court of Appeals, both in this case and in *United States v. Barone,* 584 F. 2d 118 (6th Cir. 1978) has specifically refused to follow that principle. *See* Appendix B at 15a-16a.

Petitioners therefore submit this Court ought to resolve that conflict.[9]

The District Court dismissed the indictment not because Modesitt rather than Cleaves testified in the grand jury, but because the hearsay nature of Modesitt's testimony was concealed and the deception impaired the grand jury's function:

> In this situation, however, the Court finds that the wealth of detail presented in Agent Modesitt's testimony to the Grand Jury, indubitably had the same affect [sic] upon the Grand Jury that his detailed observations later had upon the Court, at the suppression hearing. He was a most convincing witness. He was a man who obviously, to the listener, had made thorough and cautious observations. He was credible.

See Appendix D at 43a.

Contrary to the Court of Appeals' suggestion that the hearsay testimony was "immaterial to the grand jury's determination" (17a), the observations made by Cleaves went to the essence of the grand jury's task, *i.e.*, determining whether either petitioner's possession of the bag containing the contraband was with knowledge of its contents. That determination would rest in significant part on the overt behavior of the possessor indicating consciousness of guilt. The grand jury was therefore entitled to know that the only witness before it had not made the relevant observations.

---

9. The Ninth Circuit also appears to have rejected the *Estepa* rule. *United States v. Samango*, 607 F. 2d 877, 880, n.6 (1979).

The District Court listened to the explanations offered by Modesitt and the Assistant United States Attorney and concluded that the misrepresentation was deliberate. That conclusion was amply supported by both the grand jury testimony itself and by the "lame" excuses offered in justification thereof. The court's findings were not clearly erroneous, thus dismissal of the indictment was proper.

CONCLUSION

For the above-stated reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

DOMENICK J. PORCO
DILLER & SCHMUKLER
Attorneys for Petitioners

APPENDIX A — DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED APRIL 8, 1983

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

82-1672/3

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES A. WILSON (82-1672)
EDWARD NEMBHARD (82-1673),

Defendants-Appellants.

ORDER

BEFORE: KEITH and MERRITT, Circuit Judges and BROWN, Senior Circuit Judge.

This is the second time this case has been before this court on appeal. On April 19, 1982, a panel of this court reversed the district court's dismissal of the indictment and remanded the case for reinstatement of the jury's verdict. *United States of America v. Nembhard,* 676 F.2d 193 (6th Cir. 1982).

Both parties rely upon the operative facts as set forth in Judge Brown's opinion in the prior appeal. *Id.* at 195-97. However, the appellant presents the following three issues for review: (1) whether the judgment entered by the district court is supported by the

evidence, (2) whether the court denied the defendants their sixth amendment rights by refusing to sever the trials, and (3) whether the court erred in not providing the jury with transcripts of the trial when they were requested.

Appellant Nembhard argues that his conviction is based on purely circumstantial evidence and thus cannot support a jury verdict of guilty beyond a reasonable doubt. In *United States v. Meyers,* 646 F.2d 1142, 1143 (6th Cir. 1981), the court stated,

> On appeal from a criminal conviction, the question is whether the relevant evidence viewed in the light most favorable to the government could be accepted by a reasonably-minded jury as adequate and sufficient to support the conclusion of defendant's guilt beyond a reasonable doubt. (citations omitted). Whether the evidence is direct or circumstantial, the test is whether it would permit the jury to find the defendant guilty beyond a reasonable doubt.

See also United States v. Cornett, 484 F.2d 1365, 1367 (6th Cir. 1973); *United States v. Ambrose,* 483 F.2d 742, 746 (6th Cir. 1973). As these cases make clear, the test is not whether the evidence is direct or circumstantial. Rather, it is whether the jury could have found guilt beyond a reasonable doubt. Upon review of the record, we conclude that there was sufficient evidence from which a jury could have made such a finding.

The appellants also maintain that the refusal to sever their trials was reversible error. Appellant Nembhard maintains that he was denied the right to present a defense because Appellant Wilson would not agree to testify if the co-defendants were tried

jointly. He cites evidence given at a prior suppression hearing which he argues exculpated him from any wrongdoing.

At the severence motion hearing, the district court asked the defendant's counsel to specify the nature of the exculpatory evidence. Defense counsel implied that because Appellant Wilson had testified at a suppression hearing the tan vinyl bag carrying the heroin was in his possession at all times, Nembhard could not be found guilty of either possession of a controlled substance or aiding and abetting. However, defense counsel could not give an answer as to why such a drastic conclusion must be reached on the basis of Wilson's testimony. Therefore, the court denied the motion for severance.

It is clear that a motion for severance or separate trials is committed to the sound discretion of the trial court. *United States v. Goldfarb,* 643 F.2d 422 (6th Cir.), *cert. denied,* 454 U.S. 827 (1981); *United States v. Echeles,* 352 F.2d 892 (7th Cir. 1965); *United States v. Kramer,* 236 F.2d 656 (7th Cir. 1956). It is also clear that an "efficient and expeditious adjudication may not be had at the expense of a defendant's right to a fundamentally fair trial." *Echeles,* 352 F.2d at 896. Thus, "[w]hat constitutes an abuse of discretion in terms of safeguarding each defendant's rights in such cases necessarily depends upon the facts in each particular case." *Id.* at 897.

In *United States v. Boscia,* 573 F.2d 827 (3d Cir.), *cert. denied,* 436 U.S. 911 (1978), the Third Circuit pointed to four factors which the court should consider in balancing the rights of the defendant against the need for an efficient trial. These factors are: (1) the likelihood of the co-defendant testifying, (2) the degree to which such testimony would be exculpatory, (3) the degree to which the testifying co-defendant could be impeached, and (4) the need for judicial economy. *Id.* at 832.

The district court applied the test set forth in *Boscia*. The court was aware that co-defendant Wilson had signed an affidavit which stated that he would testify if he were given a separate trial which was concluded before he was called as a witness at Nembhard's trial. However, the court concluded that the testimony Wilson would give would not be exculpatory. We agree and therefore affirm the district court's decision to deny the motion for severance.

Finally, the appellants assert that the district court erred by refusing to give the jury the transcripts it requested. Approximately one-half hour after the jury deliberations began, the jury requested transcripts of the testimony of the five Drug Enforcement Agents. The district court sent a note to the jury saying that the transcripts were being prepared, but not yet available. The jury sent back a note asking when the transcripts would be available. The court replied that they would be unavailable for jury deliberations. The jury sent a third note in which it inquired if it could have specific portions of testimony from particular agents. Again, the district court sent a note telling the jury that it would have to rely upon its collective memory. The jury was then sent home for the day, but returned the next day and reached a verdict before noon.

Defense counsel objected to each of the court's responses, but did not suggest that the court have the court reporter read back portions of the testimony to the jury. Indeed, he expressed some reservations about such a process since the trial had been a lengthy one. The court did not err in refusing to give the jury portions of testimony. The court could reasonably have believed that, by so doing, it would call undue attention to one portion of testimony to the detriment of equally important testimony. *See generally United States v. Blasser,* 651 F.2d 600 (8th Cir.), *cert. denied,* 454 U.S. 944 (1981); *United States v. Olsen,* 589 F.2d 351 (8th Cir. 1978), *cert. denied,* 440 U.S. 917 (1979).

Appendix A

Accordingly, the judgment entered by the Honorable Anna Diggs-Taylor of the United States District Court for the Eastern District of Michigan is affirmed.

ENTERED BY ORDER OF
THE COURT

s/ John P. Hellman

Clerk

APPENDIX B — DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED APRIL 19, 1982

No. 81-1125

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

EDWARD NEMBHARD and JAMES WILSON,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed April 19, 1982.

Before: BROWN and KENNEDY, Circuit Judges; CELEBREZZE, Senior Circuit Judge.

BAILEY BROWN, Circuit Judge. Appellees, Edward Nembhard and James Wilson, were arrested in Detroit Metropolitan Airport shortly after they deplaned from a flight from New York City when heroin was found in the luggage that Wilson was carrying. After they were indicted on four counts for possession of heroin with intent to distribute[1] and aiding and abetting each other,[2] the district judge heard and overruled their motion to suppress the evidence.

The case then went to trial. The testimony of the drug enforcement officer who had testified before the grand jury was supplied to the court and defense counsel, and it developed at the trial that part of this grand jury testimony was

---

[1] 21 U.S.C. § 841(a)(1) (1976).

[2] 18 U.S.C. § 2(a) (1976).

Appendix B

United States v. *Nembhard, et al.* No. 81-1125

hearsay. The district judge then took under advisement defendants' motion to dismiss the indictment on the ground that the grand jury had been misled. Further, during the trial, defendants reasserted their motion to suppress on the ground that, they contended, the trial testimony showed that one of the officers who participated in the surveillance and arrest of defendants, in making his decision to approach and question them, in part relied upon the fact that defendants are black. The district judge also took this motion under advisement. The defendants were found guilty by the jury on all counts.

On the day the guilty verdicts were returned, the district judge filed an order, supported by two separate memoranda, granting the motions to suppress and to dismiss the indictment and setting aside the guilty verdicts. *United States* v. *Nembhard*, 512 F.Supp. 15 and 19 (E.D. Mich. 1980). She determined that the conduct of the government and its witness before the grand jury in misleading the grand jury as to the hearsay nature of part of the testimony was so egregious as to require, in the exercise of supervisory capacity, a dismissal of the indictment. The district judge further determined that one of the surveillance officers had relied on inappropriate "racial stereotypes," that this reliance also tainted the decisions of all the officers who participated in the surveillance and questioning of the defendants, and that therefore the evidence must be suppressed.

The government then brought the instant appeal of the district court's decision suppressing the evidence and dismissing the indictment. We conclude that the record does not reflect a legitimate basis for dismissing the indictment. We further conclude that the district judge was correct in denying the motion to suppress prior to the trial and that the evidence adduced at the trial was not an adequate basis to change her decision. Accordingly, we vacate the order suppressing the evidence, dismissing the indictment and setting aside the guilty verdicts and remand for reinstatement of

Appendix B

No. 81-1125 *United States* v. *Nembhard, et al.*

the indictment and the guilty verdicts and for entry of judgments of conviction.

I.

On April 21, 1980, Detective Sergeant Paul Cleaves of the Michigan State Police and Special Agent William Modesitt of the Drug Enforcement Administration (DEA) were observing deplaning passengers at Detroit Metropolitan Airport from an American Airlines flight from New York City, a source city for white heroin. Edward Nembhard and James Wilson were the first two passengers to deplane, Nembhard carrying a tan vinyl suitcase and Wilson carrying a black briefcase. Nembhard, who was in the lead, appeared to be in a hurry, and nervously scanned the deplaning area as if he were looking for someone. The two men did not walk together or speak to each other, and appeared not to know each other.

Both men walked to a bank of telephones near the deplaning lounge, made telephone calls while looking back in the agents' direction, and hung up at about the same time. Agent Modesitt left the lounge area to follow another passenger, a young white woman, before the termination of the phone calls, and Cleaves was left to continue the surveillance. Wilson hung up the telephone and began walking slowly toward the concourse. Nembhard also hung up his telephone, breezed past Wilson, and began walking up the concourse, staying about ten to twenty feet ahead of Wilson, who quickened his pace when Nembhard passed him. Nembhard constantly looked back toward the trailing agent as he continued up the concourse and slowed down periodically, allowing Wilson to catch up. The lead changed at one point, with Wilson passing Nembhard, but Nembhard regained the lead and eventually a sizeable interval between the two men emerged. Nembhard then stopped at a bank of telephones near the airport restaurant, and dialed a number without

apparently depositing any money in the telephone. Nembhard hung up when Wilson caught up with him, and they began conversing as they entered the restaurant together. Wilson and Nembhard had not spoken to each other at any time during their journey down the concourse nor acknowledged each other's presence until this point.

His suspicions fully aroused, Cleaves called for assistance and he was eventually joined by Agents Bruce Bryda, Robert Dunn and Richard McCoy. Agent Modesitt also rejoined the surveillance at the restaurant. Wilson and Nembhard spent about thirty-five minutes in the restaurant, sitting at the same table and conversing. Nembhard stared at Cleaves several times as Cleaves, seated at the bar, glanced in their direction. When the suspects exited the restaurant, the agents noticed that they had exchanged their luggage, Nembhard now carrying the tan vinyl luggage and Wilson the black briefcase. Nembhard paced up and down waiting for Wilson to finish a phone call he made upon leaving the restaurant. They then walked together at a normal pace through the north terminal.

When they reached the end of the concourse, Nembhard glanced back down the concourse, then both men scurried down an escalator, through the baggage claim area for United Airlines (although their flight had been on American Airlines), and left the terminal. As they headed for a taxicab, three of the agents, who had used another exit, approached them. Agent Modesitt, addressing Wilson, identified himself as a police officer, showed Wilson his badge, and asked if Wilson would step aside out of the path of traffic from the terminal exit to answer some questions, which Wilson assented to do. Modesitt then asked if he could see Wilson's airline ticket and some identification. Wilson, his hands shaking, produced a New York driver's license with his proper identification, but claimed he had no airline ticket, contending that he had been in Detroit for two days visiting friends. He also denied knowing Nembhard, claiming they had never met.

Agents Bryda and McCoy simultaneously approached Nemb-

Appendix B

No. 81-1125 *United States* v. *Nembhard, et al.*

hard, who also stepped off to the side of the terminal exit. In response to Agent Bryda's inquiries, Nembhard claimed he had neither identification nor an airline ticket but stated that his name was Edward Nembhard. He at first claimed that he did not know Wilson, but when challenged by the agents' recitation of his restaurant rendezvous with Wilson, Nembhard maintained that they had met on the airplane. When asked to accompany the agents to the first aid office inside the terminal for further questioning, both Wilson and Nembhard agreed to do so.

At the first aid room about thirty-five yards away, Modesitt and Wilson waited in the hall for several minutes while the other agents spoke to Nembhard. Nembhard's briefcase was searched with Nembhard's consent, but nothing illicit was discovered, although it contained papers belonging to Wilson. After Nembhard was thanked for his cooperation and left the room, Wilson and Modesitt entered the room. Agent Modesitt advised Wilson that he was a federal narcotics agent, said he was looking for narcotics coming into the airport, and told Wilson he believed Wilson could be carrying narcotics. Wilson did not respond. Modesitt asked for Wilson's consent to search his luggage and person; Wilson was advised of his right to refuse. Wilson told Modesitt he could search the suitcase but denied it was his luggage and claimed he was paid to carry it. Modesitt opened the suitcase, seized approximately ten ounces of 67% pure heroin, and placed defendants under arrest.

Agent Modesitt was the only witness who testified before the grand jury as to the events leading up to the search and arrest. The United States Attorney elicited Modesitt's explanation that he and Detective Sergeant Cleaves had met the New York City flight and initially began observing the defendants' activities. The queries concerning defendants' behavior were framed in terms of what "you" observed. Modesitt responded with details of what "we" and "us" observed and thought. The United States Attorney did not seek further

clarification of who "we" and "us" constituted. Consequently, the grand jury was never informed that Modesitt's personal observations were temporarily discontinued when he briefly instituted surveillance of another deplaning passenger while defendants were both engaged in their initial telephone calls and that Modesitt's personal knowledge of defendants' activities did not resume until he rejoined the surveillance team at the restaurant. When Modesitt's grand jury testimony was challenged at trial, he explained that he knew hearsay evidence was admissible before the grand jury, and he followed his regular procedure of merely describing the activities of the entire surveillance team without differentiating between personal observations and the reports of other agents.

Defendants made a motion to suppress evidence obtained from an alleged illegal search, which was entertained in August of 1980. The district court denied the motion, finding that Modesitt and the other agents "clearly had a reasonable and articulable suspicion that Defendants were carrying narcotics, after approximately an hour of observation." The district judge enumerated the following facts which substantiated her finding that the "seizure" of the defendants was reasonable:

> First, the agents saw Defendants debark from the plane from New York City, a known source of white heroin in the midwest. Second, they emerged nervously, "scoping out"; or surveying the persons in the concourse in a more furtive manner than normal travelers. Third, they emerged first from the plane, as is a known habit of couriers, to quickly dissolve into the crowd, if they do not sit to emerge last . . . . Fourth, they had checked no luggage, but had kept carry-on pieces in their possession. Fifth, they clearly attempted to conceal their togetherness, through the concourse. Sixth, they exchanged possession of their respective pieces of luggage, at the airport restaurant. Seven, they went to two separate phones to place calls on at least two occasions, but

Appendix B

No. 81-1125 *United States* v. *Nembhard, et al.*

> appeared not to really have conversations. And possibly to use those occasions to further "scope out" the position of the agents who were following them. Eighth, Mr. Nembhard, the obvious leader through their airport peregrinations for almost an hour, continually looked back at the following crowd and made eye contact with the agents on numerous occasions. Nine, after an hour of dawdling, as defendants rounded the last mile of the concourse into the home stretch to the escalator, Nembhard looked back one last time at the agents, and then, after turning the corner, speeded up the pace, moved quickly down the escalator, and out to the cab stand.

Appendix at 181. The district court further concluded that Nembhard gave clear and uncoerced consent to a search, and that Wilson also gave valid consent to the search of his suitcase. The district court stated that the only pressure on Wilson was from Nembhard's prior cooperation, not from any coercive actions of the government agents.

The defendants renewed their motion to suppress the evidence and also moved to dismiss the indictment after the trial commenced. The district court held the motions in abeyance pending the jury's verdict. The jury found both defendants guilty as charged on December 4, 1980. That same day, the district court granted the motion to suppress and also dismissed the indictment. The district court filed separate memorandum opinions stating its reasons for its abrupt change of position. *United States* v. *Nembhard,* 512 F.Supp. 15 and 19 (E.D.Mich. 1980).

After having heard Cleaves's testimony at trial, the district court concluded:

> Sergeant Cleaves grounded his most basic and fundamental conclusion that criminal activity was afoot upon a completely illogical and unfounded racial stereotype, [therefore] this court concludes that the conduct which he testified that he later observed and reported to his fellow officers was not a reasonable ground upon which

to bottom the decision to single out Mr. Nembhard and Mr. Wilson for approach.

Id. at 18.

The district court's conclusion was based on the following cross examination testimony of Cleaves at the trial:

Q [By Mr. Campbell, Attorney for Nembhard] I see. Now, sir, back – going to the point where you indicated where you were back at the gate with Mr. Modesitt and you are observing the arrival of Flight 455 – 455, is that correct?
A To my knowledge, that's correct.
Q And the first person – the first two people that came out the door were two black males, Mr. Wilson and Mr. Nembhart?
A That's correct.
Q And you immediately became suspicious of them, is that correct?
A We observed them from – immediately start observing the two –
Q I want to know if you became suspicious of them?
A No.

• • •

Q So you picked up the first two black males off the plane?
A We picked out –
Q Not we, you?
A Yes, sir.

• • •

THE COURT: What attracted your attention immediately?

THE WITNESS: They are two gentlemen from New York. They're dressed, apparently alike. They're dressed similarly. They are both of the same race. They both were walking in the same direction. They both went to the telephone. They both appeared to make telephone calls. They both did not converse to each other, but were walking in the same vicinity of each other.

Appendix B

No. 81-1125 *United States* v. *Nembhard, et al.*

THE COURT: So you were suspicious of them before they had moved from this rampway towards the terminal, really?

THE WITNESS: I was interested in them at that point, your Honor.

THE COURT: As soon as you saw them?

THE WITNESS: Yes.

Q (By Mr. Campbell) So you are interested in black males coming from New York?

A I was interested in these two black males coming from New York.

Appendix at 206-08.

The district court further concluded that the judgment of the other agents except for Modesitt was tainted by Cleaves's unwarranted suspicions, since they in part relied upon Cleaves's initial observations of the defendants' incongruous behavior down the concourse to the restaurant for their suspicions. The district court finally found that "[a]lthough Agent Modesitt testified that race was not a factor in his original observation of the defendants, his credibility has been substantially eroded" because "Modesitt had falsely represented to the grand jury that he had personally observed *all* of the defendants' airport activity . . . ." 512 F.Supp. at 18-19. In conclusion, the district court determined that the agents did not have a reasonable suspicion that Wilson and Nembhard were engaged in criminal activity, and therefore the two defendants were illegally "seized." The district court also concluded that the consent given to the search of Wilson's suitcase following the illegal seizure was a result of duress; consequently, the district court suppressed the evidence obtained from that search. *Id.* at 19.

In its second opinion, *United States* v. *Nembhard*, 512 F. Supp. 19 (E.D. Mich. 1980), the district court concluded that Modesitt's grand jury testimony, found to be deliberately misleading, was "an abuse of the grand jury system so egregious

as to warrant intervention by the use of the court's supervisory powers." *Id.* at 23, quoting *United States* v. *Barone*, 584 F.2d 118, 125 (6th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979). Because the government's course of action "made a mockery of the judicial process," 512 F.Supp. at 23, quoting *United States* v. *Barone, supra* at 127 (Keith, J., dissenting), the district court dismissed the indictment against the defendants.

II.

In *United States* v. *Barone, supra*, the United States had presented ten live witnesses before a grand jury for the United States District Court for the Southern District of Ohio in an effort to indict Barone. The grand jury returned a "no true bill." Subsequently, the matter was presented to a second grand jury empaneled by the United States District Court for the Eastern District of Kentucky, which returned an indictment on the strength of the testimony of only one witness, a DEA agent. Barone conceded on appeal that a valid criminal indictment could be based solely on hearsay evidence, *Costello* v. *United States*, 350 U.S. 359 (1956); nevertheless, he contended that "it was unfair to seek and obtain through the hearsay evidence of one federal agent what could not be obtained through the direct testimony of ten eyewitnesses." *Barone, supra* at 125. This court rejected Barone's contentions, and specifically declined to follow the Second Circuit case of *United States* v. *Estepa*, 471 F.2d 1132 (2nd Cir. 1972), which held that a court's supervisory powers to dismiss an indictment could be utilized where improper and misleading hearsay testimony was used to procure the indictment. This court stated:

> In conclusion, while we do not foreclose the possibilty of an abuse of the grand jury system so egregious as to warrant intervention by the use of our supervisory powers, such a circumstance clearly does not exist here, and we

Appendix B

No. 81-1125 *United States* v. *Nembhard, et al.*

> are not inclined to adopt the position of the Second Circuit in *Estepa.*

Barone, supra at 125.

Despite this court's specific rejection of the *Estepa* rationale in *Barone,* the district court, citing and discussing both opinions, dismissed the indictment against Nembhard and Wilson because of the "egregious" nature of Agent Modesitt's "deliberate" concealment of the hearsay nature of part of his grand jury testimony. In doing so, the district court abused its discretion.

The courts have repeatedly urged a sparing use of supervisory powers for deterrence purposes by dismissing the indictment and only on a showing of demonstrated and long-standing prosecutrial misconduct. *United States* v. *Artuso,* 618 F.2d 192, 196-97 (2nd Cir.), *cert. denied,* 449 U.S. 861 (1980) (same circuit as *Estepa*); *United States* v. *Fields,* 592 F.2d 638 (2nd Cir. 1978), *cert. denied,* 442 U.S. 917 (1979); *United States* v. *Owen,* 580 F.2d 365 (9th Cir. 1978). The Second Circuit has stated:

> There is simply no need to thwart the public interest in prosecuting serious crimes unless the government misconduct is widespread or extraordinarily serious. This was not the case here, and therefore it was an abuse of discretion to dismiss the indictment.

United States v. *Broward,* 594 F.2d 345, 351 (2nd Cir.), *cert. denied,* 442 U.S. 941 (1979). There is no showing in this record that prosecutorial misconduct is a long-standing or common problem in grand jury proceedings in this district.

The Supreme Court recently concluded that because of the strong public interest in prosecuting serious crimes, prejudice to the defendant must be shown before dismissal of an indictment would be warranted when the government has interfered with a defendant's Sixth Amendment right to counsel. *United States* v. *Morrison,* 449 U.S. 361 (1981). The Tenth

Circuit in *United States* v. *Drake*, 655 F.2d 1025 (10th Cir. 1981), extended the *Morrison* rationale to require that actual undemining of a fair trial must also be demonstrated when a federal court uses its supervisory powers rather than a constitutional basis to dismiss an indictment for prosecutorial misconduct. There was no showing of an iota of prejudice to either Nembhard or Wilson by Modesitt's grand jury testimony, since his summary of the surveillance activities accurately reflected the events as they unfolded, and the hearsay testimony, which was essentially background information, was immaterial to the grand jury's determination that there was probable cause to believe that the defendants had committed a crime.[3] Therefore, the district court's extreme sanction of dismissing the indictment was clearly unwarranted.[4]

III.

The district court's decision to reverse its position post-verdict and grant defendants' motion to suppress the evidence was based on three factors: (1) Cleaves's testimony was discounted because, the district court concluded, his initial suspicions were aroused partially because Wilson and Nembhard were black and thus his suspicions were racially motivated; (2) such impermissible use of race as a basis of suspicion tainted the observations of the other surveillance agents except for Modesitt, since the other agents did not personally

---

[3] *See United States* v. *Cathey*, 591 F.2d 268, 272-73 (5th Cir. 1979).

[4] The United States also argues that the district court was clearly erroneous in determining that Agent Modesitt deliberately misled the grand jury (i.e., committed perjury), in concealing the hearsay nature of portions of his testimony. Since Modesitt was never expressly asked who observed the defendants after they left the deplaning lounge and Modesitt also offered the plausible explanation that he knew hearsay evidence was admissible before the grand jury and did not believe he needed to distinguish between it and his personal observations, we are dubious about the district court's finding that Modesitt intentionally misled the grand jury. Nevertheless, we need not reach this issue because we conclude that the district court erred as a matter of law in using its supervisory powers to dismiss the indictment without showing prejudice to the defendants and long-standing misconduct before grand juries in this district.

observe suspicious activities creating an articulable suspicion independent of Cleaves's racially-biased surveillance; and (3) Modesitt's suspicions were discredited because his credibility was compromised by his "deliberately misleading" testimony before the grand jury. We conclude that the district court abused its discretion because it had an insufficient basis for ignoring its initial findings of fact and made an evidentiary ruling that was not supported by those initial findings.

The district court was unwarranted in inferring that Cleaves utilized an impermissible racial stereotype as the motivation for his initial suspicion of defendants' behavior. Cleaves's testimony falls far short of suggesting that persons of other races with similar conduct would not also have been investigated, and the district court's concern that the surveillance was racially motivated is simply indefensible.[5] When considered in context, Cleaves's observation that Nembhard and Wilson, the first two individuals off the flight, were of the same race was just one of several factors indicating to Cleaves that the defendants were travelling together, and he became suspicious because they were trying to appear as if they were not together.

Furthermore, we find no basis for the court's conclusion that Cleaves's subsequent observations of the defendants were tainted by his use of the fact that they were of the same race as one of the criteria justifying a further inquiry. We do not think the district court was free to conclude on the basis of this evidence that Cleaves could not judge objectively whether appellees acted nervous, or tried to appear separate when in fact they were together, or appeared to talk on the phone when in fact they did not, independently of defendants' race.

If Cleaves's suspicions were not racially motivated, the suspicions of his colleagues of course were not tainted. Further-

[5] Appellees' counsel at oral argument conceded that the district court's racial consideration was not defensible.

more, even assuming that Cleaves's observations were properly discredited, we conclude that the district court was clearly erroneous in belatedly finding that "each of the other law enforcement officers who observed the defendants and later prevented them from leaving the airport relied substantially upon the initial judgment of Sergeant Cleaves in arriving at their suspicion of criminal conduct" and that "Agents Dunn, Bryda, McCoy and Modesitt did not personally observe any conduct reflective of a surreptitious relationship." 512 F.Supp. at 18. To the contrary, Agent McCoy, who was alerted by Modesitt that Cleaves was trailing two suspects off the New York City flight, joined Cleaves's surveillance while Wilson and Nembhard were still walking down the concourse, seemingly unaware of each other, and he witnessed Wilson first pass Nembhard, then observed Nembhard retake the lead, without either acknowledging the other's presence. McCoy's testimony corroborates Cleaves's observations and provides an independent basis for a reasonable suspicion of the defendants' elaborate concerted action of travelling in tandem down the concourse while remaining aloof from each other, at least to unsuspecting eyes, until they reached the restaurant, at which point they abandoned their pretense. Even without Cleaves's observations, there was more than sufficient independent evidence of surreptitious behavior to warrant suspicion of criminal conduct.[6]

Because there was no reasonable basis for the district court to disregard its initial findings on the suppression issue, we conclude that they should be reinstated and used to evaluate whether a reasonable suspicion of criminal conduct existed to justify the agents' interception of the defendants as they prepared to leave the airport.

---

[6] Although we are doubtful that the district court was justified in discrediting Modesitt's testimony of the defendants' activities, we need not reach the issue whether the district court was clearly erroneous in questioning his credibility in light of our conclusions about the testimony of Cleaves and the other agents.

Appendix B

No. 81-1125 *United States* v. *Nembhard, et al.*

The first issue is at which point the reasonableness standard of the Fourth Amendment should be applied. The district court on both occasions found "that the defendants were seized when they were approached for questioning by the three Drug Enforcement Administration agents." *Id.* at 17. The issue of when a seizure occurs in the context of an airport investigatory stop has been the subject of an intense debate in the federal courts, including this circuit and the Supreme Court.[7] However, since a resolution of that issue is not critical to the disposition of this case, we shall assume for purposes of argument that the district court was correct in its finding that a seizure occurred when Wilson and Nembhard were initially approached and that Fourth Amendment considerations came into play at that time.

It is well established that the standard by which the reasonableness of the agents' initial approach of Nembhard and

---

[7] Attempts to resolve this issue have only muddied the waters of search and seizure jurisprudence. In *Mendenhall* v. *United States*, 446 U.S. 544 (1980), only two members of the majority, Justices Stewart and Rehnquist, explored the issue of whether a seizure occurred. They determined that a federal narcotics agent may approach an individual in an airport, identify himself as a police officer, and question the suspect without Fourth Amendment considerations coming into play, and concluded that a seizure occurs when a reasonable person believes he is not free to leave when stopped for questioning. *Id.* at 553-54. The three concurring justices, as well as the dissenting justices, declined to address the seizure issue because it was not raised below and therefore they assumed that Mendenhall was seized when she was approached for questioning by DEA agents. *See, e.g.*, *id.* at 560 (Powell, J., concurring) and 570-71 (White, J., dissenting). In *Reid* v. *Georgia*, 448 U.S. 438 (1980) (per curiam), decided one month after *Mendenhall*, the Court similarly assumed for purposes of argument that a seizure had been effected when a suspected drug courier was stopped and questioned at the Atlanta Airport.

This court has also considered the seizure issue post-*Mendenhall*. In *United States* v. *Jefferson*, 650 F.2d 854 (6th Cir. 1981), this court determined that even if Justice Stewart's *Mendenhall* analysis was accepted, a seizure occurred in *Jefferson* because the suspected drug courier was stopped and immediately asked to accompany the DEA agent to the baggage claims office without any initial questioning taking place; therefore, Jefferson could not reasonably have believed he was free to leave. This circuit has not addressed the issue whether a seizure occurs when a suspect is initially approached if, as occurred in the instant case, an interval exists between the initial contact and a subsequent move to another location for further questioning.

Wilson is measured is their ability to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968). *See also, Brown* v. *Texas*, 443 U.S. 47, 51 (1979); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884 (1975). "While the Court has recognized that in some circumstances a person may be detained briefly, without probable cause to arrest him, any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *Reid* v. *Georgia*, 448 U.S. 438, 440 (1980) (per curiam). The evaluation of the reasonableness of the agents' interception of defendants is a conclusion of law examined independently by an appellate court. *See, e.g., id.* at 441; *United States* v. *Mendenhall*, 446 U.S. 544, 565 n. 5 (1980) (Powell, J., concurring); *United States* v. *Bowles*, 625 F.2d 526, 533 n. 7 (5th Cir. 1980).

It is our conclusion that the DEA agents articulated specific objective facts justifying the investigatory stop of Nembhard and Wilson as reasonable under the circumstances. "The reasonableness of seizures that are less intrusive than a traditional arrest, depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Brown* v. *Texas*, *supra* at 50 (citations deleted), quoting *United States* v. *Brignoni-Ponce*, *supra* at 878. An "assessment of the whole picture" must be made from the specialized viewpoint of the law enforcement officers. *United States* v. *Cortez*, 449 U.S. 417 (1981); *United States* v. *Mendenhall*, *supra* at 561 (Powell, J., concurring). One of the major factors to be considered for the reasonableness of an investigatory stop is the relative intrusiveness of the investigatory stop. *Id.*

With regard to the agents' initial approach, the instant case, unlike *Reid* and *United States* v. *Jefferson*, 650 F.2d 854 (6th Cir. 1981), presents objective facts that sufficiently support the agents' reasonable inference that defendants were

engaged in criminal activity, thus warranting a brief investigatory stop for questioning. In *Reid*, DEA agents depended on the drug courier profile, an "informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics" to justify an airport investigatory stop. *Reid, supra* at 440. The Supreme Court determined that Reid's arrival from a source city in the early morning with only carry-on luggage, which corresponded with some profile characteristics, "describe[s] a very large category of presumably innocent travelers," and therefore was insufficient by itself to justify a suspicion of criminal activity. *Id.* at 441. The Court further concluded that "the fact that [Reid] preceded another person and occasionally looked backward at him as they proceeded through the concourse" did not support a "fair inference" that Reid and his companion "were attempting to conceal the fact that they were travelling together," but instead was a mere "hunch." *Id.*

In *Jefferson*, this court sought to harmonize *Reid* and *Mendenhall* in this fashion:

> The conflicting results in *Reid* and *Mendenhall* are explained by the differences in the relevant facts. In *Mendenhall*, the defendant engaged in conduct for which there was no reasonable explanation except as an attempt to avoid detection while smuggling drugs. She took great pains to observe any possible agents in the airport, she walked to the luggage area in the terminal without apparent reason, and she changed her airline ticket en route. By contrast, in *Reid*, actions of the defendant were not unreasonable or suspicious in themselves.

Id. at 857. Accordingly, this court concluded that the agents who intercepted Jefferson at the Detroit Airport did not have a reasonable suspicion that Jefferson was a drug courier:

> The fact that Jefferson walked quickly in the terminal, arrived from Los Angeles, and did not pick up his luggage until someone arrived to pick him up at the airport, are

not sufficient to create a well-founded suspicion. None of these actions are suspicious in themselves, nor are they suspicious when all are taken together.

Id.

On the contrary, here the aggregate of facts as initially determined by the district judge did warrant a reasonable inference that defendants were engaged in criminal activity. Unlike *Reid*, the instant case involves more than just profile characteristics unsupported by other articulable facts. The agents here had more than a mere "hunch" that defendants were attempting to conceal the fact that they were travelling together; their aloof yet concerted in-tandem conduct warranted a reasonable inference that they were in fact hoping to conceal their association. Such surreptitious conduct has been found to support a reasonable suspicion of criminal behavior in the airport surveillance context. *United States* v. *Bowles, supra* at 534-35 & n.11; *United States* v. *Vasquez*, 612 F.2d 1338, 1342-43 (2nd Cir. 1979), *cert. denied*, 447 U.S. 907 (1980). Defendants' arrival from a source city for heroin,[8] the exchange of luggage, Nembhard's nervousness at various stages of the surveillance,[9] the defendants' scrutiny of the lounge area,[10] Nembhard's periodic glancing over his shoulder at the receding concourse for evidence of surveillance,[11] defendants' "staring" at the agents,[12] use of simulated

---

[8] While *Reid* discounted reliance solely on drug courier profile characterstics, this does not mean that arrival from a source city along with other characteristics in the drug courier profile cannot be included in the *totality* of circumstances justifying an investigatory stop. *Accord, United States* v. *Berry*, 670 F.2d 583, 600-601 (5th Cir. 1982) (en banc).

[9] *See id.* at 603.

[10] *See Mendenhall, supra* at 564 (Powell, J., concurring); *United States* v. *Forero-Rincon*, 626 F.2d 218, 222 (2nd Cir. 1980).

[11] *See United States* v. *Viegas*, 639 F.2d 42, 45 n.5 (1st Cir.), *cert. denied*, 451 U.S. 970 (1981).

[12] *See United States* v. *Berry, supra.*

telephone calls to afford opportunities for "scoping" out hazardous areas,[13] and defendants' evasive attempt to quickly slip out of the airport, when considered together, were more than sufficient to create a well-founded suspicion of criminal behavior.

The initial intrusion into the defendants' liberty interests was slight, involving only a few minutes of defendants' time in a public place to answer routine questions about their identity and their activities. Although defendants were asked to step aside out of the path of other exiting patrons, this was a reasonable request to avoid inconvenience and embarrassment to the defendants. The reasonableness of the entire initial stage of questioning is undeniable. *See, e.g., United States* v. *Viegas*, 639 F.2d 42, 45 (1st Cir.), *cert. denied*, 451 U.S. 970 (1981); *United States* v. *Forero-Rincon*, 626 F.2d 218, 224 (2nd Cir. 1980).

Furthermore, the additional information received by the agents during the minimally intrusive initial stage of questioning "provided a quantum leap to the 'articulable facts' known" by the agents. *United States* v. *Berd*, 634 F.2d 979, 986 (5th Cir. 1981). When Wilson lied about having been in Detroit for two days, Nembhard denied having identification or a ticket, and both defendants denied knowing each other when surveillance had indicated an intimate association resulting in the exchange of carry-on luggage, a request to retire to the terminal for additional questioning, although involving a more significant intrusion, was entirely justified under the circumstances.[14] Even if the questioning of the defendants is considered a custodial interrogation amounting to the essential equivalent of an arrest, *Dunaway* v. *New York*, 442 U.S. 200 (1979), *United States* v. *Blum*, 614 F.2d 537 (6th Cir. 1980), we conclude that the circumstances gave rise to prob-

---

[13] *See United States* v. *Viegas*, *supra*, at 43 & 45 n.5.

[14] *See United States* v. *Herbst*, 641 F.2d 1161, 1167-68 (5th Cir. 1981); *United States* v. *Berd*, *supra* at 986.

able cause for continued detention for additional questioning; therefore, we need not determine whether defendants' trip inside the terminal was voluntary or a result of coercion.

The district court also reversed its findings post-verdict about Wilson's consent to search the tan vinyl bag, stating that the presence of two agents for corroboration purposes during his separate questioning was coercive. Because we have already determined that Wilson was not unlawfully detained, his apparent consent to the search of the luggage was not infected by any unlawful detention. Furthermore, questioning by two agents, without further indication of duress, is not inherently coercive. Without any additional facts presented at trial warranting a conclusion that the district court's initial finding that Wilson consented to the search was incorrect, we must conclude that the district court's post-verdict finding of duress was without any basis in fact; therefore, the court's original finding of voluntariness must be reinstated.[15] We further conclude that the warning Wilson received that he need not consent to the search, along with the other circumstances, sustained the district court's original determination that consent was voluntarily given. See *Mendenhall, supra* at 558-60 (Court's opinion on consent issue concurred in by all five members of the majority).

Since the district court erred in dismissing the indictment and suppressing the evidence and setting aside the guilty verdicts and since these actions were taken subsequent to valid jury verdicts of guilty, this order of the district court is vacated, and the case is remanded for reinstatement of the indictment and the guilty verdicts and for entry of judgments of conviction.

---

[15] The United States has urged on appeal that the defendants had no standing to challenge the search of the tan vinyl bag, since neither defendant asserted an interest in the bag. However, we do not reach this issue, since it was not raised before the district court.

APPENDIX C — DECISION OF THE UNITED STATES DISTRICT COURT REPORTED AT 512 F. SUPP. 15 (E.D. MICH. 1980)

UNITED STATES DISTRICT COURT

E.D. MICHIGAN, S.D.

Crim. No. 80-80318

UNITED STATES OF AMERICA,

Plaintiff,

v.

EDWARD NEMBHARD and JAMES WILSON,

Defendants.

Dec. 4, 1980.

Ronald P. Weitzman, Asst. U.S. Atty., Detroit, Mich., for plaintiff.

Warren D. Bracy, Fletcher J. Campbell, Detroit, Mich., for defendants.

OPINION

ANNA DIGGS TAYLOR, District Judge.

[1] During the course of this trial each defendant moved the court to reconsider its previous denial of their pretrial motion to suppress evidence and oral statements which the government

obtained as fruits of the airport stop and search. Based upon the new facts which have come to light during the course of trial of this matter, the motions to reconsider and to suppress will be and now are granted. As Judge Bazelon noted in *Rouse v. U.S.*, 359 F.2d 1014 (D.C.Cir., 1966), the court must be particularly sensitive to new matters when the government has engaged in a warrantless search of its citizens. This court endorses his statement that it is the duty of a trial judge to re-examine the issue of suppression, when previously undisclosed information is adduced at trial or the credibility of key witnesses is significantly called into question.

[2] The subject of the drug courier profile and of airport stops has been considered in a number of decisions within the Sixth Circuit as well as by the Supreme Court of the United States within the last few years. The courts have universally recognized the necessity for striking a balance between our societal interest in curtailing the sale of narcotics and their resulting destructive effects, and our equally strong interest in each individual's rights to personal security and freedom from the arbitrary intrusion of law enforcement officials. *U.S. v. Pope,* 561 F.2d 663 (6th Cir., 1977). Without reasonable and articulable facts upon which to base a suspicion that a citizen is engaged in criminal activity, a warrantless search or seizure is universally recognized as being constitutionally impermissible. Reliance merely upon the loosely defined characteristics known as the "drug courier profile" alone is not constitutionally sufficient to sustain a reasonable suspicion that criminal conduct is afoot. However, the profile's permissible components along with other relevant information known or observed by police officials may be considered to arrive at a reasonable suspicion of criminal conduct. *Reid v. Georgia,* 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890, 1980; U.S. v. Smith, 574 F.2d 882 (6th Cir., 1978).

Appendix C

The recent Supreme Court opinion in *U.S. v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497, 1980 reviews the question of when the constitutional safeguards of the 4th Amendment are implicated by police stops. While Justices Stewart and Rehnquist conclude that not all personal approaches of police to citizens necessitate 4th Amendment scrutiny, they do not doubt that once a person's freedom of movement has been restrained by a show of authority, the standards enunciated in *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and applied to the drug courier profile case must be demonstrated.

[3] The threshold question presented in an airport stop case is whether the exchange between the law enforcement officials and the citizen constitutes a seizure. Based upon the totality of circumstances now on the record on this case, I find as a matter of fact that the defendants were seized when they were approached for questioning by the three Drug Enforcement Administration agents. A reasonable person in either Mr. Nembhard's or Mr. Wilson's position would have believed that they were not free to leave, despite the testimony of Special Agents Bryda, McCoy and Modesitt that no force or coercion was marshalled against the defendants. In arriving at this conclusion I have considered not only the number of officers present during the airport surveillance, and the later approach and seizure, but the credibility of the agents as tested by the more vigorous cross-examination of trial; and particularly by cross-examination against contradictory portions of the transcripts of their earlier testimony.

Detective-Sergeant Cleaves testified that he believed that Mr. Nembhard made furtive eye-contact with him several times during his walk from the jetway, through the concourse and into the airport restaurant. Although Cleaves and the other special agents attempted to avoid detection of their surveillance by Mr. Wilson or Mr. Nembhard each of five officers indicated that they believed

the defendants were aware of their surveillance, based upon frequent eye-contact and gestures. Although only three officers actually ran to stop the defendants as they prepared to engage a taxi, it would have been completely reasonable for defendants to conclude that a larger force was present to meet with any resistance. After the officers displayed their credentials and informed Nembhard and Wilson that they were involved in the detection of narcotics trafficking, and wished to question them, the suspects were escorted back to the terminal, closely accompanied on all sides by DEA agents. The court notes that the questioning of defendant Wilson did not cease despite the fact that he produced a driver's license for identification in response to agent Modesitt. The license was not returned, but was kept by the agent. Mr. Nembhard stated that he had no identification, but he too was asked inside to be questioned further. It was apparent to this court, after listening to the testimony of the agents, that Nembhard and Wilson would have been detained and formally arrested on the sidewalk by the officers regardless of their conduct or the answers they supplied once stopped. It was therefore reasonable for the defendants to have perceived the reality of their circumstances and to realize that they were not at liberty to ignore the requests and questions posed by the agents.

[4] Having determined that a seizure took place once the defendants were stopped on the sidewalk, the court must assess whether the seizure was a product of reasonable and articulable facts which could logically support an inference of criminal behavior. While the training and experience of the law enforcement official is relevant to tally a sum total of information which might otherwise appear innocent, the constitutional standard may not be satisfied by inchoate and unparticularized suspicions, or a mere hunch. Unquestionably, racial stereotypes and prejudices may not be a component of the equation that any law enforcement officer relies upon to focus his suspicions of criminal conduct.

Appendix C

After listening to the testimony of Detective-Sergeant Paul Cleaves at trial, I find that impermissible racial considerations tainted his analysis of the defendants' conduct from the instant that he saw them. When asked by the court why his attention was drawn to Nembhard and Wilson and to no one else, Cleaves responded that he was immediately interested when he observed two gentlemen of the same race, similarly dressed, debarking from the first class section of a flight originating in New York City. Although hundreds of presumably innocent first class passengers land daily at Detroit Metropolitan Airport from New York City the Detective-Sergeant's suspicions were aroused because these two passengers were black. At the pretrial suppression hearing, all racial considerations had been denied by all present. In view of Sergeant Cleaves' revelation, the court concludes that his racial preconceptions colored his assessment of defendants' conduct, after drawing his attention to their presence. The subsequent behaviors which Cleaves described, that of Nembhard's "nervousness", of furtive eye-contact with the person following him, indicative of "scoping" for surveillance, and of walking at varying paces apart from each other through the terminal, is equally as compatible with innocent and normal conduct as it is indicative of criminal activity. Because Sergeant Cleaves grounded his most basic and fundamental conclusion that criminal activity was afoot upon a completely illogical and unfounded racial stereotype, this court concludes that the conduct which he testified that he later observed and reported to his fellow officers was not a reasonable ground upon which to bottom the decision to single out Mr. Nembhard and Mr. Wilson for approach.

I further find that each of the other law enforcement officers who observed the defendants and later prevented them from leaving the airport relied substantially upon the initial judgment of Sergeant Cleaves in arriving at their suspicion of criminal conduct. That was their testimony. In contrast to Sergeant Cleaves'

conclusion that Nembhard and Wilson were attempting to hide the fact of their being together, Agents Dunn, Bryda, McCoy and Modesitt did not personally observe any conduct reflective of a surreptitious relationship. They watched the defendants lunch together. Agent McCoy, who joined Sergeant Cleaves as the defendants approached the restaurant, affirmatively stated that Nembhard and Wilson acknowledged each other before they entered the Innkeeper. Significantly, each of the Drug Enforcement Administration Agents who testified, stated from the witness stand that they very well may not have arrived at the decision to detain and question Nembhard and Wilson were it not for the characteristics of suspicious activity reported to them by Cleaves.

The court's original decision not to suppress the evidence seized at the airport was based substantially upon its assessment of Agent Modesitt's credibility. However, that conclusion was made prior to the revelation that Modesitt had falsely represented to the grand jury that he had personally observed *all* of the defendants' airport activity; and that the only officer who observed "furtive" conduct had first become suspicious because two black individuals emerged from the first class section of an airplane. His conclusions and the conclusions of the other officers who relied upon his assessments do not rise to the level of a reasonable suspicion. Although Agent Modesitt testified that race was not a factor in his original observation of the defendants, his credibility has been substantially eroded. I find that the racial stereotype upon which Cleaves based his decision to follow the defendants thoroughly poisoned the judgment of the agents who eventually stopped and questioned Nembhard and Wilson. I can only conclude, therefore, that none of the agents possessed an untainted and reasonable suspicion that Mr. Wilson and Mr. Nembhard were engaged in criminal activity at the time they were seized on the sidewalk.

Appendix C

[5, 6] Having concluded that defendants were seized in violation of their 4th Amendment rights, this court must assess whether a valid consent to search their baggage was secured by the agents. The question of voluntariness of consent is one of fact to be determined from the totality of circumstances. *Schneckloth v. Bustamonte,* 412 U.S. 218, 227, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973). The government has the burden of proof in establishing that a consent following an illegal seizure is made unequivocally, without the contamination of duress or coercion. *Simmons v. Bomar,* 349 F.2d 365 (6th Cir., 1965). Upon examining the circumstances of the seizure, the number of agents involved, their varying testimony on the subject, and the manner in which the searches were executed, I conclude that any consent the defendants may have given was the product of duress, rather than intelligently or voluntarily made.

As stated earlier, after listening carefully to the trial testimony, this court is convinced that the defendants would not have been free to walk away from the officers regardless of their responses to questions posed. Consequently, the fact that Wilson and Nembhard accompanied the agents back to the terminal does not demonstrate voluntary cooperation on the defendants' behalf. Upon being told that the officers were drug enforcement agents it was reasonable for the defendants to conclude that each of them was armed, even if weapons were not brandished. After being escorted up a narrow corridor to the so-called "first aid room" the defendants were not only isolated from passers-by at the airport, but from one another as well. They were then scrutinized separately, each by two officers who could corroborate any version of the facts they might feel called upon to give. Indeed, they testified that their separation of and pairing-off with each defendant was for the purpose of corroboration. Under these circumstances, the government has failed to demonstrate that cooperation or consent was tendered which was not a direct

product of duress and coercion. Thus I hold that the evidence which was uncovered at the airport, as well as any statements which the defendants then made, must be suppressed.

Therefore, the Motions to Suppress have been reconsidered and granted.

APPENDIX D — DECISION OF THE UNITED STATES DISTRICT COURT REPORTED AT 512 F. SUPP. 19 (E.D. MICH. 1980)

UNITED STATES DISTRICT COURT

E. D. MICHIGAN, S. D.

Crim. No. 80-80318.

UNITED STATES OF AMERICA,

Plaintiff,

v.

EDWARD NEMBHARD and JAMES WILSON,

Defendants.

Dec. 4, 1980.

Ronald P. Weitzman, Asst. U.S. Atty., Detroit, Mich., for plaintiff.

Warren D. Bracy, Fletcher J. Campbell, Detroit, Mich., for defendants.

MEMORANDUM OPINION

ANNA DIGGS TAYLOR, District Judge.

The grand jury which returned the indictment upon which this prosecution was based heard testimony on one day (May 7, 1980) and heard from only one witness: Drug Enforcement

Appendix D

Administration Special Agent William E. Modesitt. He detailed all observations made at Metropolitan Airport which led to these defendants' arrest and prosecution. Agent Modesitt named each of the agents who were detailed with him at the airport. He then described the debarkation of the defendants from a New York flight, and stated that "as we were watching", each defendant appeared to place a telephone call while "trying to detect a surveillance." Assistant U. S. Attorney Weitzman then asked (Tx p. 6):

> "Q. When you say we, that would be yourself. . . ."

The agent's response was the following interposition:

> A. Myself and Detective Sgt. Paul Kleese (sic) had met this flight. Just after this we continued to watch individuals and they both hung up the phone and proceeded to walk down the American Airlines concourse area on the upper level towards the south terminal.

Throughout the remainder of his testimony to the grand jury, Agent Modesitt spoke in terms of all observations having been made by "we" and "us", never dissociating himself from those who were making the observations. He presented a detailed description of the suspicious and furtive characteristics and actions which the defendants displayed, as they loitered through the airport. The climax of his testimony was that he ulitmately opened the travel case taken from defendant Wilson and found therein two bags of a white powder which was subsequently determined to be heroin.

Appendix D

The grand jury transcript was first provided to defense counsel by Assistant U.S. Attorney Weitzman on November 13, 1980; the second day of trial and the day on which Agent Modesitt took the stand. The court requested a copy of the transcript from Mr. Weitzman, and received it, on November 17, 1980.

In the meanwhile, Agent Modesitt had testified at a June, 1980 hearing before the court, on defendants' motion to suppress the evidence seized at the airport. His testimony at the hearing was that he left Sergeant Cleaves at the American Airlines gate area at the time the defendants were walking towards the telephones, and did not observe them again until he later rejoined the agents who were following defendants at the Innkeeper Restaurant. From that point forward, his testimony is similar to that which was given to the grand jury. At the suppression hearing Modesitt testified that he had left Sergeant Cleaves at the gate in order to follow a young white woman, the fourth passenger to debark, who appeared nervous, changed her direction twice, and had no luggage. He followed her to the baggage claim area, where she claimed one bag and he abandoned her surveillance. He could not recall how he happened to go, from there, to the Innkeeper Restaurant where he rejoined the surveillance of these defendants.

Modesitt's testimony about leaving the defendants to follow a more suspicious white woman was offered after the defendants' insistence that the agent's decision to follow these defendants was based upon race. Modesitt denied any racial implication, and volunteered that he had left them, indeed, to follow a white woman. At trial, however, he testified that the woman had later claimed not one but four bags, and gave differing stories as to how he came to rejoin the agents in pursuit of these defendants. Sergeant Cleaves testified at trial that he followed the defendants because they were two men "of the same race," and apparently traveling first class.

Appendix D

The court refused to suppress the airport evidence at the suppression hearing largely on the basis of the credibility of Modesitt's testimony, as my statements on the record at the conclusion of the hearing will indicate. The motion to suppress has been reconsidered and granted, post-verdict, for the reasons more fully stated in another opinion.[1]

At trial, Modesitt's testimony was that he left the American Airlines arrival gate area after the two defendants had debarked, and as they walked towards the bank of phones. He left Cleaves in that area, and himself did not continue to watch the defendants as they used the telephones, and through their peregrinations to the Innkeeper Restaurant. He testified that he made none of the observations which he told the grand jury, at transcript pages 4 through 10, were made by a "we" and "us" consisting of "myself and Cleaves."

At the conlusion of Modesitt's trial testimony, defendants made and filed their motions to dismiss the indictment for the giving of perjured testimony to the grand jury. Arguments were heard from all parties. The court took the motions under advisement; the jury has now returned verdicts of guilty; and the motions have been renewed. The court finds that it must grant the motions, set aside the verdicts, and dismiss the indictment.

In *United States v. Estepa*, 471 F.2d 1132, 1137 (2nd Cir., 1972), the Second Circuit reversed a defendant's conviction with instructions to the district court to dismiss the indictment. It held that the grand jury must not be misled into thinking that it is getting eyewitness testimony from an agent, when it is actually getting an account whose hearsay nature is concealed. That circuit's rule was stated as being that prosecutors are given wide latitude in the use of hearsay before a grand jury, with two alternative provisos:

Appendix D

1. Do not deceive the grand jurors as to the "shoddy merchandise they are getting."

or

2. The case must not present a high probability that, with eyewitness testimony, the grand jury would not have indicted.

The *Estepa* opinion refers us to an earlier line of previously minority Second Circuit thought in this area. In the case of *United States v. Beltram,* 388 F.2d 449 (2nd Cir., 1968), Judge Medina's dissent pointed out that the failure to call an eyewitness to the grand jury may have caused a conviction which would otherwise have been an acquittal, because the eyewitness' credibility at trial could have been impaired under cross examination by its conflict with his prior grand jury testimony. Similarly, Judge Friendly noted in *United States v. Borelli*, 336 F.2d 376 (2nd Cir., 1964), that the government ought not be allowed, by having its principal witness speak through the voice of another, to deprive a defendant of his right to impeach by contradictions.

Again, in *United States v. Payton*, 363 F.2d 996 (2nd Cir., 1966), the Second Circuit had refused to dismiss an indictment because the agent's conduct at the grand jury was "not shown to be deceitful." But Judge Friendly's dissent had stated that:

> The course followed by the Government in this case makes a mockery of the Fifth Amendment's guarantee that 'No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.' What compromises this indictment is not that the grand jury heard only hearsay testimony as in

Appendix D

> *Costello v. United States* [350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397], but that, in sharp contrast to that case, it had no way of knowing that the testimony which was all it was hearing was hearsay. Despite the lame apology offered at trial by Agent Ward, his statements to the grand jury . . . were the words of a man who had seen or heard whereof he spoke and were plainly meant to be taken as such; . . . . It is plain that had any such deception occurred at trial, whether through or without design, it would not be countenanced. . . ." 363 F.2d 100 (Citations omitted).

In the Sixth Circuit, this set of circumstances has not yet been presented. However, in *United States v. Barone*, 584 F.2d 118 (6th Cir., 1978), the appellant sought reversal of his conviction for the district court's refusal to suppress, despite the false statement of an agent in his affidavit requesting a search warrant. The agent had falsely stated that the informant had provided "me" with information which had been reliable in the past. The informant, in actuality, had never before provided the agent with any information whatsoever. Barone also sought to have his indictment dismissed because of the prosecutor's failure to advise the grand jury, which heard only one agent witness, that a prior grand jury had heard many witnesses and refused to indict. Appellant Barone did not claim that the agent led the grand jury into the mistaken belief that his testimony was entirely firsthand; but claimed that it was improper to obtain an indictment through one witness' hearsay testimony that could not be obtained with the direct testimony of ten witnesses.

Our Sixth Circuit court said in that case that:

> . . . we are not disposed to follow the rule of the Second Circuit in *Estepa*, [and] we observe that

> the standards set forth by Judge Friendly in that case were not violated here in any event. 584 F.2d at 125.

The *Barone* case is, therefore, clearly distinguishable from the one here presented. In that case there was not the slightest indication or contention that the one agent witness misled the grand jury during his testimony. The court's most significant language, for this court's instruction, today, is:

> . . . *while we do not foreclose the possibility of an abuse of the grand jury system so egregious* as to warrant intervention by the use of our supervisory powers, such a circumstance clearly does not exist here, and we are not inclined to adopt the position of the Second Circuit in *Estepa*. 584 F.2d at 125.

Judge Keith's dissent in *Barone* recalls the test which the Sixth Circuit had set down in *United States v. Luna*, 525 F.2d 4 (1975), cert. den. 424 U.S. 965, 96 S.Ct. 1459, 47 L.Ed.2d 732 (1976). That test sought to deter police misconduct and safeguard the judicial process. The *Luna* decision was that the knowing use of a false statement by an affiant with the intent to deceive the court authorizes the invalidation of an affidavit which is sufficient probable cause, on its face. This is true even if the statement can be said to be immaterial to probable cause. The court held that, "In our judgment such perjury must lead to suppression of the evidence in order to prevent fraud upon the judicial process." 525 F.2d at 8. Accordingly, Judge Keith wrote in *Barone*, the agent's false affidavit "perpetrates a fraud upon and makes a mockery of the judicial process." 584 F.2d at 127. Therefore, he wrote, the affidavit should be impeached, the motion to

suppress should have been granted, and the conviction should be reversed.

Since the Sixth Circuit's *Barone* decision, the Ninth Circuit has had occasion to consider a case more similar to this. In *United States v. Samango*, 607 F.2d 877 (9th Cir., 1979), that circuit affirmed the district court's dismissal of an indictment where the grand jury had been given a transcript of testimony before a prior grand jury which "served no other reason than calculated prejudice", 607 F.2d at 883, and where the DEA agent testified to aspects of the case with which he had not been involved, where the hearsay nature of his testimony would not necessarily be apparent to the grand jurors, who might have been misled into thinking that he was describing his own observations. The court wrote that:

> The facts of each case determine when Government conduct has placed in jeopardy the integrity of the criminal justice system. Although no perjury has been alleged in the present case, we believe the prosecutor's behavior has exceeded the limits of acceptability. 607 F.2d at 884.
>
> If the grand jury is to accomplish either of its functions, independent determination of probable cause that a crime has been committed *and* protection of citizens against unfounded prosecutions, limits must be set on the manipulation of grand juries by over-zealous prosecutors. 607 F.2d 882.
>
> The prosecutor has a duty of good faith to the Court, the grand jury, and the defendant. *United States v. Basurto*, 497 F.2d 781, 786 (9th

> Cir., 1974). In *Basurto*, this court held that defendant's right to due process was violated where they had to stand trial on an indictment which the government knew was based partially upon perjured testimony. Furthermore, trial on such an indictment failed to comport with "fastidious regard for the honor of the administration of justice." *Id.* at 787, quoting *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115, 76 S.Ct. 663, 100 L.Ed. 1003 (1956). 607 F.2d 884.

Judge Hufstedler had concurred with the majority result in *Basurto*, but had objected to the constitutional basis for the decision. She relied, instead, upon the court's power and duty to supervise the admnistration of justice, which power and duty extend to grand jury proceedings.

This court finds, today, that the case of *United States v. Nembhard and Wilson*, D.C., 512 F.Supp. 15 is far closer in facts to *Estepa*, to *Luna* and to *Samango*, that it is to *Barone*. Indeed, this case presents what the Sixth Circuit found was specifically absent, in *Barone*, ". . . an abuse of the grand jury system so egregious as to warrant intervention by the use of the court's supervisory powers." This is a case in which the grand jurors were deceived as to the shoddy merchandise they were getting; and therefore it meets one of the two alternative criteria set by *Estepa* for dismissal of the indictment. The government's principal witness for much of defendants' airport activity, Officer Cleaves, was permitted to speak to the grand jury through the voice of Agent Modesitt and, as Judge Friendly wrote in *Borelli*, and Judge Medina wrote in *Beltram*, the defendants were to that extent deprived of the opportunity to impeach Cleaves by contradictions, at trial. More basically, the government's course of action, as Judge Friendly wrote in *Payton*, and Judge Keith wrote in *Barone*, has "made a mockery of the judicial process." As Judge Keith

wrote and the Sixth Circuit has held in *Luna*, the knowing use of a false statement perpetrates a fraud, and requires reversal of a conviction, even where the false statement is *immaterial*. In this situation, however, the court finds that the wealth of detail presented in Agent Modesitt's testimony to the grand jury indubitably had the same effect upon the grand jury that his detailed observations later had upon the court, at the suppression hearing. He was a most convincing and credible witness; a man who obviously had made thorough, cautious, unprejudiced observations; and, moreover, was a man who gave the impression of having an excellent memory. As it turns out, the finder of fact on both occasions was misled.

As Judge Hufstedler wrote in her concurring opinion in *United States v. Basurto*, 497 F.2d 781 (9th Cir., 1974):

> An important function of our supervisory power is to guarantee that federal prosecutors act with due regard for the integrity of the administration of justice. 497 F.2d at 793.

The power of the court to dismiss an indictment for prosecutorial misconduct, on the basis of its supervisory powers as reaffirmed in *United States v. Owens*, 580 F.2d 365 (9th Cir., 1978).

> Under its inherent supervisory powers, a federal court is empowered to dismiss an indictment on the basis of governmental misconduct. . . . As such, dismissal is used as a prophylactic tool for discouraging future deliberate governmental impropriety of a similar nature. 580 F.2d at 367.

This court, accordingly, dismisses this indictment.